No. 82-1355

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1982

CORNELIA DEROIN YELLOWFISH, ET AL.,

Petitioners,

vs.

CITY OF STILLWATER, OKLAHOMA, AND THE UNITED STATES OF AMERICA,

Respondents.

PETITIONERS' REPLY BRIEF

Yvonne T. Knight
Native American Rights Fund
1506 Broadway
Boulder, Colorado 80302
(303) 447-8760

Counsel for Petitioners

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ARGUMENT

1. The United States argues that this Court's decision in United States v. Oklahoma Gas & Electric Co., 318 U.S. 206 (1943) supports the proposition that current congressional policy approves state control over trust allotments, and that the application of 25 U.S.C. § 357 to trust allotments is thus consistent with that policy. See Brief For The

United States in Opposition 6-7. The United States relies in particular upon the finding in Oklahoma Gas & Electric that Congress intended to distinguish between trust allotments within and those without existing reservations, by making allotments outside reservations subject to state law. Even though such may have been the reasonable view of federal policy in 1943, that policy had changed beginning with the passage of the Indian Reorganization Act of 1934, 25 U.S.C. § 461 et seq., although the change was, in 1943, not yet generally reflected in federal statutes. See, Petition for Certiorari 13-14.

Then in 1948 Congress passed legislation confirming its new policy that trust allotments should be subject to exclusive federal and tribal jurisdiction. 18 U.S.C. § 1151(c) established that allotted lands, like reservation lands,

are "Indian country," subject to federal and tribal jurisdiction, and 25 U.S.C. §§ 323-328 empowered the Secretary to grant, and the Indians to consent to, right-of-ways over trust allotments whether within or outside reservations.

The legislative history of 25 U.S.C. §§ 323-328 shows that one of its specific purposes was to eliminate any distinctions between allotted lands within reservations and those outside, insofar as right-of-way acquisition was concerned. See, e.g., S.Rep. No. 832, 80th Cong. 2d Sess., 1948 U.S. Code Cong. and Ad. News 1033. Significantly, the example cited in the Senate Report as illustrative of the "artificial distinctions" intended to be eliminated by 25 U.S.C. §§ 323-328 was the direct result of the decision in Oklahoma Gas & Electric, supra. As discussed in the Senate Report:

> For example, the acts of February 15, 1901 (31 Stat. 790), and March 4, 1911 (36 Stat. 1253), which authorizes the granting of transmission line rights-of-way, are limited in their application to "reservations of the United States," which have been held to include only those individual Indian allotments within the original boundaries of Indian reservations which were not extinguished by cession to the United States. These acts are also inapplicable to individual Indian allotments on the public domain. There would seem to be no persuasive reason for maintaining such artificial distinctions.

See, S.Rep. No. 823, supra at 1036, (emphasis added).

Clearly, the congressional policy evinced in 1943, the date Oklahoma Gas & Electric, supra, was decided, was not the policy evinced in 1948. Thus, Oklahoma Gas & Electric provides no support for the argument that the application of section 357 to right-of-ways across trust allotments is consistent with current

congressional policy.

Moreover, this same erroneous view of current congressional policy toward the jurisdictional status of trust allotments fatally undermines the decision of the Tenth Circuit in Plains Electric Generation & Transmission Cooperative v. Pueblo of Laguna, 542 F.2d 1375 (10th Cir. 1976), and that of the Ninth Circuit in Nicodemus v. Washington Water Power Co., 264 F.2d 614 (9th Cir. 1959). 1/ Both Courts relied heavily upon the afore-discussed erroneous view that current congressional policy favors subjecting trust allotments to state jurisdiction.

Furthermore the decision of the Eighth Circuit in United States v.

1/ In its most recent decision, Southern California Edison Co. v. Rice, 685 F.2d 354, cert. denied, 51 U.S.L.W. 3703 (U.S. Mar. 28, 1983) (No. 82-873), the Ninth Circuit simply relied on its decision in Nicodemus.

Minnesota, 113 F.2d 770 (8th Cir. 1940) was rendered before the aforementioned 1948 congressional legislation affecting allotted lands, and thus that Court had no occasion to consider the status of congressional policy toward allotments in the considerable light cast by that legislation.

2. As more fully discussed in (a), contrary to the United States' contention, the standard of reasonableness applied in United States v. Mason, 412 U.S. 391 (1973) is not properly applicable to judge the propriety of the United States' continuing conduct in this case because that standard assumes that circumstances could exist under which the conduct could be upheld as reasonable. The particular conduct of the United States in this case is inherently and irreconcilably in conflict with its trust duty to prevent the

alienation of trust property and, therefore, the Mason standard is inapplicable.

However, as more fully discussed in (b), even if the standard of reasonableness set out in United States v. Mason is applied, it compels the conclusion that the United States' decision was plainly unreasonable.

(a) It is a fundamental principle of trust law that

> [a] trustee commits a breach of trust if he violates any duty which he owes as trustee to the beneficiaries.

III A. Scott, The Law of Trusts § 201 at 1650 (3d ed 1967) (hereinafter Scott). The United States committed a breach of trust in this case when it took a litigating position supporting the claim of the respondent City that it has authority to condemn the trust allotments of petitioners for a right-of-way.

Such a position is inherently and irreconcilably in conflict with the trust duty imposed by Congress on the Secretary of the Interior under the General Allotment Act of 1887, as amended, 25 U.S.C. §§ 331 et seq. "to prevent alienation of the [allotted] land. ..." United States v. Mitchell, 445 U.S. 535, 544 (1980), accord, II Scott, "Duty to Preserve the Trust Property," § 176 at 1419.

Moreover, the United States' litigating position is beyond its powers as the Indians' trustee. Under general trust principles, a trustee has no power to violate a duty to the beneficiary. As Professor Scott states in the prelude to the trust powers section of his treatise: "When it is said that the trustee has the power to do an act ..., we mean that he has the power to do it without violating a duty to the beneficiary."

III Scott § 185A at 1496. Accordingly, since a litigating position supporting the respondent City's claim of power to condemn trust allotments for right-of-ways is inherently antagonistic to the United States' duty to prevent alienation of trust allotments, the United States has no power as the Indians' trustee to take such a position. Cf. United States v. Sioux Nation of Indians, 448 U.S. 371 (1980) (federal condemnation power over Indian lands is the antithesis of the federal trust power). The United States, therefore, failed to represent the petitioners as their trustee as required by Minnesota v. United States, 305 U.S. 382 (1939), and this action, therefore, lacked an indispensible party. Id. See also, Petition for Certiorari 18-22.

However, the United States in its Brief in Opposition argues that the

propriety of its litigating position should be tested under the standard set forth in United States v. Mason, supra, and that, under the Mason standard, the United States' position should be upheld as proper.

The standard applied in United States v. Mason to judge the propriety of the litigating decision made by the United States as the Indians' trustee is the traditional trust standard. Under traditional principles of trust, a trustee has a duty to enforce claims for the purpose of preserving the trust property, II Scott § 177 at 1424, and likewise a duty to defend actions which seek to diminish the trust property, II Scott § 178 at 1428, when it is reasonable to do so under the circumstances, II Scott §§ 177, 178, supra, § 174 at 1408 (duty to exercise reasonable care and

skill), III Scott § 187.2 at 1513 (reasonableness of trustee's exercise of judgment).

This Court in Mason applied the traditional trust standard and held that the United States acted reasonably in not bringing suit to challenge the applicability of an estate tax to trust allotments because the tax had previously been upheld by the Supreme Court in a case which subsequently had been neither overruled nor questioned. See Mason, supra at 400.

The problem with the application of the Mason standard to judge the United States' litigating position is that the standard assumes the possibility that circumstances could exist under which that position could be found to be reasonable. Obviously, the standard is inappropriate when the power exercised

is inherently and irreconcilably in conflict with a trust duty. Such conduct is per se a breach of trust.

However, while the United States has no power to take a litigating position in support of the respondent City's power to condemn, as we discussed earlier, under general trust principles, the United States, as the Indians' trustee, has the power to defend or not to defend suits seeking to diminish the trust estate.

Therefore, the Mason standard is applicable only if the litigating position of the United States is within its trust powers. Then the standard applies to judge the reasonableness of the exercise of the power. Insofar as the United States' litigating position implies that the United States also decided at some point not to raise the defense that section 357 is not applicable to right-

of-ways, then the Mason standard applies to judge the propriety of that decision.

(b) Assuming arguendo that the litigation decision of United States in this case may also be considered as a decision not to raise a defense, application of the Mason standard compels the conclusion that the United States breached its trust in not raising the jurisdictional defense that section 357 does not authorize condemnation of right-of-ways over trust allotments.

Essentially, Mason established that the standard of reasonableness by which to judge litigation decisions of the United States acting as trustee is to be found in an analysis of controlling judicial precedent. In Mason, the decision of the United States not to sue was upheld because it relied on a controlling Supreme Court case. In this

case there is no controlling Supreme Court case. 2/

This case arose within the jurisdiction of the Court of Appeals for the Tenth Circuit. Under Mason, since there was no controlling Supreme Court decision, the question becomes whether the United States' failure to raise the defense in question was reasonable in light of the law of the Tenth Circuit. We contend that a reasonable trustee, in light of the Tenth Circuit law, the law of other circuits, and an analysis of congressional policy from the viewpoint of a trustee that it was reasonable to raise the defense in question in section 357

2/ Indeed, this Court has expressly declined to reach the issue with respect to Section 357 in previous cases choosing instead to rest the decision on other grounds. See, Minnesota v. United States, 305 U.S. 382, 391 (1939); and United States v. Clarke, 445 U.S. 253, 254 n.1 (1980), and see also Petition for a Writ of Certiorari at 11-12.

proceedings within the jurisdiction of the Tenth Circuit.

The Tenth Circuit had never ruled on the issue raised in this case. The reasoning of the Tenth Circuit in Plains Electric Generation & Transmission Cooperative v. Pueblo of Laguna, 542 F.2d 1375 (10th Cir. 1976) argueably controlled the jurisdictional issue in this case, and compelled a decision that section 357 does not apply to right-of-ways. See Petition for Certiorari 13-14.

The United States, however, argues that the case of Transok Pipeline Co. v. Darks, 565 F.2d 1150 (10th Cir. 1977), cert. denied, 435 U.S. 1006 (1978) dispelled any inference that the question of the relationship between section 357 and sections 323-328 was not settled in the Tenth Circuit. See Brief for the United States in Opposition at 6 and 9

n.7. On the contrary, the reasonable construction of that case reconciles it with the analytical approach taken by the Tenth Circuit in Plains Electric.

Transok involved the question of whether an underground gas storage "easement" could be condemned under section 357, without the Secretary's consent. The Court examined a number of statutes including sections 323-328 and found that none required the consent of the Secretary to condemnation of a gas storage "easement". The Court did not specify the grounds for its finding but two inferences are possible.

On the one hand it might be inferred that section 357 was found to be an alternative to sections 323-328. This is respondents' argument. But it may also be inferred that the Court found that a gas storage "easement" is not a

right-of-way subject to 25 U.S.C. §§ 323-328 or covered by any other special statute, and hence, section 357 applies. This is petitioners' argument. Under petitioners' argument, Transok is plainly harmonious with the reasoning and decision in Plains Electric. In contrast, respondents' argument necessarily assumes that the Tenth Circuit made an erroneous finding, i.e., that sections 323-328 apply to an underground gas storage "easement". For this reason, respondents' view of the ground for the Transok decision is unreasonable.

Furthermore, at the time of the appeal of this case to the Tenth Circuit, there was only one other circuit court case precisely in point, i.e., Nicodemus v. Washington Water Power Co., 264 F.2d 614 (9th Cir. 1959) (upholding condemnation of right-of-ways under section

357 notwithstanding 25 U.S.C. §§ 323-328). And there was another circuit court case closely related, i.e., United States v. Minnesota, 113 F.2d 770 (8th Cir. 1940) (upholding condemnation of a highway right-of-way under section 357 notwithstanding 25 U.S.C. § 311). Neither of these cases is, of course, controlling in the Tenth Circuit, and sound arguments can be made as to why the reasoning and conclusions of those cases should be rejected. See, supra at 1-6.

And finally, the United States itself has on past occasions raised, approved, or othewise acknowledged the reasonableness of the defense that section 357 does not apply to right-of-ways covered by special statutes empowering the Secretary to grant right-of-ways. These occasions are discussed in the Petition for Certiorari 11-12.

CONCLUSION

We respectfully request this Court to grant the petition for a writ of certiorari.

May, 1983 Respectfully submitted,

Yvonne T. Knight
Native American Rights Fund
1506 Broadway
Boulder, Colorado 80302
(303) 447-8760